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Written statement* submitted by the Asian Legal Resource Centre, a non-governmental organization in general consultative status

The Secretary-General has received the following written statement which is circulated in accordance with Economic and Social Council resolution 1996/31.

[26 May 2014]

* This written statement is issued, unedited, in the language(s) received from the submitting non-governmental organization(s).

NEPAL: Need for amendment of Truth and Reconciliation Law

1. The process of transitional justice in Nepal has encountered deliberate and blatant delays mainly due to the sheer lack of commitment and will of the political parties. The establishment of the Truth and Reconciliation Commission (TRC) against disappearances and the establishment of the Commission against Disappearances have been expressly mandated and provisioned by both the Interim Constitution and the Comprehensive Peace Agreement (CPA) as far back as 2006, which remain the two major instruments setting out Nepal's transitional justice process. However, a decade has passed since and Nepal is yet to implement any of these processes. A half- hearted attempt at the establishment of the TRC was resorted to in 2013, when the government came up with a completely flawed Ordinance of the TRC where even serious crimes were subjected to an amnesty, provisions were made for reconciliation to be carried out ex parte, without the consent of the victims and there were no safeguards nor guarantee of prosecution. Due to these flaws in the law Nepal's civil society and human rights organizations, after many an agitation against, rejected outright these attempts at bringing in a law, for the establishment of a Commission for Truth and Reconciliation and another for disappearances, in Nepal.

2. Nepal's apex Court, the Supreme Court, also rejected outright the provisions of this Ordinance and on 2 January 2014 in its judgment, heavily criticized some of its key provisions and it was declared unconstitutional and in violation of international human rights law. In a directive, the Supreme Court ordered that the Ordinance be repealed or amended significantly to bring it in line with Nepal's obligations under national and international law, and made strong recommendations to appoint an expert panel and to come up concrete recommendations for the drafting of a Truth and Reconciliation Bill. Further, as per the court's decision, there should be no amnesty provided if, in instances of serious crimes including rape, murder, abduction, sexual violence, mental and physical torture and forced evictions.
The government formed the expert panel, which was given 10 days and forced the panel to submit its report before the deadline following which the panel hurriedly submitted the draft recommendation within 7 days, in direct contravention of the Supreme Court orders, and therefore in contempt of Court, reintroduced the Ordinance with no amendments at the meeting of the Legislative-Parliament, not even in the least abiding by their own expert panel's recommendations. This raises grave concerns over the government's respect for the rule of law in Nepal.

3. Moreover, this move was seen as against the provisions of the Interim Constitution too, which clearly states that the Supreme Court's rulings are binding on the Government of Nepal. The Supreme Court has previously held that any mechanism for transitional justice must be in conformity with international standards, lead to accountability for serious human rights violations, and ensure victims their right to remedy and reparations, which includes the right to truth and justice.

4. The tabling of a rejected version of the Ordinance in the legislature was also done in stark contravention to several of Nepal's core international obligations being a party to several international conventions. Nepal has ratified the Convention against Torture (CAT) and International Covenant on Civil and Political Rights (ICCPR). The country has also ratified the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the Convention on the Rights of Child (CRC). Under these conventions, the government of Nepal has responsibility to respect those obligations. But the present Truth and Reconciliation law undermines all such provisions and conventions.

5. The human rights community as well as the people of Nepal have categorically and flatly rejected this law. This law has also been rejected by the international community. It is also not acceptable to the victims and their families. Through this law, the Nepali government and the political parties are in an unscrupulous attempt to institutionalize impunity and undermine accountability for serious crimes committed during the decade long armed insurgency from 1996-2006.

6. The 2006 CPA has expressly stated that impunity would not be tolerated. It will not be encouraged. On the contrary, the government of Nepal in pushing for the enactment of this law, is engaged openly in attempts to institutionalize impunity for the perpetrators and also violating international human rights laws in the process.

7. The Supreme Court clearly mentioned in its decision that serious crimes should not be subject to amnesty. Amnesty cannot be given in serious crimes including rape, murder, abduction, sexual violence, mental and physical

torture and forced evictions, which also falls under the international crimes. The international laws forbid general amnesty too. Torture should not be given amnesty. Disappearances cannot be subject to amnesty. War crimes, crimes against humanity and genocide could not be subject to general amnesty. But the government of Nepal has started a process where human rights violators use it as a means to wash away their sins of committing serious violations, and thereby set them scot-free.

8. Moreover, section 22 of the TRC law has serious flaws. The law has provisions where serious human rights violations are subject to departmental action only. This is unacceptable. How can serious violations of human rights be subject to only departmental action? A full and fair trial needs to be held, and according to both national and international laws and legal order the guilty should be punished.

9. The section 26 of the current law contains vague language that does not reject amnesty to serious human rights violations including murder, abduction, rape and sexual violence, forced evictions, and mental and physical torture. It leaves open possibility where perpetrators could be given amnesty. Only the section 26 (2) contains exceptions from amnesty from rape. However, under the Nepali criminal code, there is a 35-day statutory limitation period on reporting rape. Even the consent of the victim, for reconciliation has not been made mandatory. It is a serious breach of the transitional justice as it should rightly be a victim centric process. Without the consent of the victim, no reconciliation can be done nor any amnesty given. Victims have the primacy in the transitional justice process. They have to decide whether they want to forgive and forget.

10. Reparation is not also established as a matter of rights but as a matter of charity in this law. There is no guarantee of prosecution under the law because the commission will write to the government of Nepal and it will write to the Ministry and again it goes to the office of the Attorney General. These provisions are in total contravention to the Supreme Court ruling.

11. Under the Nepalese Interim Constitution, each and every state institution is under obligation to pay attention to, implement and enforce the decision of the Supreme Court. This is their constitutional duty. Bringing this law is a serious violation of such duty.

12. The parliament is under the Interim Constitution. And there is separation of power in Nepalese institutions. Since Nepal has its interim constitution, the parliament could not go beyond the Interim Constitution. The decision of the Supreme Court should be respected and fulfilled.

13. Being a party to the ICCPR, the government shall provide effective remedies to the victims. There is no right to effective remedy and right to justice under the TRC law. Under the CPA, Interim Constitution and in the order of the Supreme Court, it is categorically mentioned that there has to be a separate commission for the truth and reconciliation and another commission set up for disappearances. Although in technical terms the TRC law has recognized this fact, there are no elaborate provisions in the law for the establishment of separate commissions. The law therefore remains silent on the provisions for the setting up of the Commission on Disappearances and so has the government of Nepal so far. These moves by the government are all being made against express provisions of the Comprehensive Peace Agreement. The government of Nepal therefore is acting in violation of its own constitution, its own laws of the land and against all international obligations in bringing forth the enactment of this law, which is fundamentally flawed.

14. In its decision, the Supreme Court further mentioned that disappearances have to be criminalized stating that even when Nepal has not ratified the International Convention for the Protection of All Persons from Enforced Disappearance, the Nepalese Constitution has ensured the right to life and thus disappearances are in violation of the right to life.

15. Therefore, one asks, how does justice prevail in such a set-up in Nepal – which issue has now reached a turning point in its history? The victims and their families have been waiting for justice for over 8 years. Their long wait for justice has been neglected and seriously undermined by the Nepali government and the political parties. This law is worse than the TRC bill that has been completely rejected by the Supreme Court in January earlier this year in a serious instance of the contempt of court.

16. This law is not acceptable not only to the international human rights law and international community but also to the victims and their families and for the people of Nepal.

17. In bringing urgent attention from the UN Human Rights Council, the Asian Legal Resource Centre (ALRC) calls on the government of Nepal to amend the Truth and Reconciliation law as per the Supreme Court directive of 2 January 2014, and giving due regard to international human rights laws and its obligation therein. The ALRC requests the UN Human Rights Council to provide technical assistance including the advice from national and international experts to the flaws of the current Truth and Reconciliation Law for its appropriate amendment. Otherwise, the victims who had suffered from the conflict will continue to suffer from injustice given.